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No. 71 - 594

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK ZIZZO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Frank Zizzo, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in the appendix to this petition (Appendix A). The order denying rehearing is printed as Appendix B.

Since this petition seeks to review the second opinion of the Court of Appeals, the first opinion which is reported at 431 F.2d 913 is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on September 8, 1971. A timely Petition for Rehearing was denied on September 28, 1971 (Appendix B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of wagering tax forms without limitation and over objection preserved on appeal in a jury trial for an alleged violation of 18 U.S.C. 1952 requires retroactive application of the cases of *Marchetti* v. *United States,* 390 U.S. 39 and *Grosso* v. *United States,* 390 U.S. 62 requiring vacation of the petitioner's conviction under the rationale of *United States* v. *United States Coin and Currency,* 401 U.S. ....., 28 L.Ed. 2d 434?

2. Whether in a case where gambling tax returns, which were filed under the compulsion of statutes which have since been held unconstitutional by this Court, have been used to prove over objection all of the elements of an alleged crime in violation of a statute which is part of the comprehensive federal scheme of laws directed against gambling, the cases of *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, should be given retroactive effect to set aside this petitioner's conviction of violating 18 U.S.C. 1952?

3. Where petitioner Frank Zizzo was charged and convicted of aiding and abetting interstate travel to further a business enterprise involving gambling in violation of

18 U.S.C. 1952, and at his trial, the court over objection preserved on appeal, admitted into evidence without limitation his Federal Wagering Tax returns and applications for Federal Tax Stamps, which were used to prove essential elements of the offense, and Petitioner commenced serving a sentence of five years' imprisonment on June 18, 1965, and was released on parole on December 19, 1966, and thereafter Petitioner was incarcerated on January 19, 1970, and his parole revoked for "improper associations", and Petitioner remained incarcerated past the date his five year sentence would have expired, until the Court of Appeals ordered his release on bail on July 13, 1970, was not the Court of Appeals originally correct in vacating the Petitioner's conviction under the *Marchetti* and *Grosso* cases on the Petitioner's petition to vacate sentence and judgment of conviction pursuant to 28 U.S.C. 2255, error coram nobis, Rule 35, F.R.Cr.P., or 28 U.S.C. 1951, and thus should not the Court of Appeals' second opinion now be reversed?

STATEMENT

On December 24, 1969, the Respondent Zizzo filed his verified Motion to Vacate Sentence and Judgment of Conviction Pursuant to Section 2255 of Title 28, U.S.C.; or In the Alternative for Issuance of a Writ in the Nature of Error Coram Nobis; or in the Alternative for Relief under Rule 35 F.R.Cr.P.; or Relief under 28 U.S.C. 1651 (R. pp. 1-5), and further filed memorandum in support of said motion (R. pp. 6-14). The Government did not file any pleading. On January 5, 1970, the District Court denied the respondent's petition.

The sentence and judgment of conviction that Zizzo sought to vacate were rendered in the United States Dis-

trict Court of the Northern District of Indiana, Hammond Division, before the Honorable George N. Beamer, on August 28, 1963, in Criminal No. 3295 (R. p. 6). The counts of the indictment on which the judgment of conviction and sentence were imposed are numbers 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 17, 18 and 19, and each count charged the Respondent with violation of Title 18, U.S.C., Section 1952 and Section 2. This Respondent in each count was charged with another defendant, with traveling in interstate commerce with the intent to promote, manage, etc. an unlawful activity, to wit: a business enterprise involving gambling in violation of the Burns Indiana Statutes, and thereafter did perform acts to promote, manage, establish, carry on, etc. said unlawful activity (R. pp. 6-7).

The case proceeded to trial on July 1, 1963 before a jury and was continued until July 10, 1963, when the jury returned its verdict of guilty as to this Respondent on the above mentioned counts of the indictment. On August 16, 1963, the post-trial motions of the defendants were overruled. On August 28, 1963, the Respondent was committed to the custody of the Attorney General of the United States for a period of 5 years as to each of the counts hereinabove numbered, the sentences to run concurrently, and subject to the provision of 18 U.S.C. 4208 (a)(2). The Respondent was fined the sum of $10,000.00 (R. p. 7).

The Respondent appealed from the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit. That Court filed an opinion on October 19, 1964 affirming the conviction of the Respondent, which decision is reported at 338 F.2d 577.

A Petition for Certiorari was sought from the Supreme Court of the United States, but was denied on May 17, 1965. A Petition to modify sentence was denied on June

18, 1965, and the Respondent was remanded into the custody of the U.S. Marshal for execution of the sentence theretofore imposed. The Respondent was granted parole on the sentence on December 19, 1966. On December 24, 1969, being the date of the filing of the motion for post conviction relief, Zizzo was on parole subject to the supervision of the United States probation and parole officers at Hammond, Indiana, which parole was to terminate on June 17, 1970. The Respondent has paid his fine as imposed by the Court under said judgment and sentence heretofore described (R. p. 8).

As of the date of the filing of the Respondent's motion below, the Respondent had been threatened by the Parole Officer at Hammond, Indiana with revocation of his parole by reason of alleged association with unfit persons. The Trial Judge denied the relief sought by the Respondent on January 5, 1970, and on January 7, 1970, entered a further written order to the effect that the Parole Board had not, to the Court's knowledge, taken any action, nor had the Court been advised it intended to take action; but that in any event, a stay pending appeal would probably deprive the Board of Parole of any future jurisdiction because Respondent's parole would expire before the appeal could be acted upon by the Court of Appeals.

Almost immediately thereafter, the Parole Officer of Hammond took the Respondent Zizzo into custody and lodged him in the Lake County Jail at Crown Point, Indiana, as a federal prisoner. The Parole Officer held a purported hearing and recommended the revocation of the Respondent's parole, which revocation was approved by the Board of Parole and the Respondent remained imprisoned past June 17, 1970, when his parole would have terminated and until ordered released by the U.S. Court of Appeals for the Seventh Circuit on July 13, 1970.

In his motion to vacate, Zizzo alieged that the sentence and judgment of conviction is illegal and invalid, since it was obtained in violation of his rights under the Fifth Amendment to the Constitution of the United States and was based substantially upon documentary evidence and statements of Zizzo which were unlawfully compelled from the Respondent in violation of the said Fifth Amendment and the right of Zizzo not to be a witness against himself in a criminal proceeding (R. p. 8).

In his motion to vacate, Zizzo relied on the following grounds and facts supporting said grounds:

The compelled returns filed by the Respondent in connection with the income tax returns, W-2 withholding tax forms, gambling tax returns, and applications for Federal Tax Stamps, were used to prove essential facts in this prosecution.

Zizzo was held by the Court of Appeals to be an aider and abettor of the interstate travel of three employe co-defendants. (*United States* v. *Zizzo,* 338 F.2d 577, 579). The Court of Appeals for the Seventh Circuit wrote as follows:

> "Here, it is undisputed that defendants Stasnick, Lazzareschi and Wojciechowski travelled almost daily from Illinois to Indiana to assist and promote the bookmaking activities of Zizzo. It is clear that the gambling business operated by Zizzo caused the interstate travel by the three employees. In the Federal Wagering returns and the Indiana tax returns signed by Zizzo, he gave Illinois addresses for his three employees who are co-defendants. A jury could properly infer that Zizzo knew the homes and places of residence of these three employees were in the State of Illinois.

"(4) Defendants contend that since Zizzo was required by law, to file returns, their use as evidence in the instant case violated the privilege against self-incrimination. Defendants cite the dissenting opinions in United States v. Kahriger, 345 U.S. 22, 73 S. Ct. 510, 97 L. Ed. 754, and Lewis v. United States, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475.

"Two of the three Justices who dissented in Kahriger and Lewis are still on the Court. However, as far as we are advised, the Supreme Court has never adopted the views expressed in the dissenting opinions as the view of the Court. We think Kahriger and Lewis stand for the proposition that the privilege of self-incrimination does not render incompetent as evidence, information which the law has compelled an individual to furnish in the past.

"In early 1961, the FBI began an investigation of Respondent Zizzo, a person who was reputed to be involved in bookmaking activities. In July 1961, Zizzo registered and paid for himself and his employees, the Federal Occupational tax imposed on wagering. This form disclosed that Wojciechowski lived in Illinois. It also showed Indiana addresses for Lazzareschi and Stasnick, but other evidence showed these Indiana addresses were not residences but places where bookmaking operations were conducted. In September 1961, the instant statute was enacted.

"At the trial, the occupational tax returns were introduced in evidence to show Respondent Zizzo knew that Wojciechowski lived in Illinois and, as circumstantial evidence, that Zizzo knew that Stasnick and Lazzareschi did not live at the Indiana addresses listed on the return.

"We think pertinent is a statement of the Supreme Court in *Lewis* v. *United States,* 348 U.S. 419, 422, 75 S.Ct. 415, 417-418. 'If petitioner desires to engage in an unlawful business, he does so only on his own voli-

> tion. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment.'
>
> "We hold that it was not error to receive the returns in evidence, and that Respondent Zizzo was not deprived of any of his constitutional rights thereby." (338 F.2d 577, 580-581) (R. pp. 9-10).

Government Exhibits 1, 2, 3 and 4 were required to be filed pursuant to the provisions of 26 U.S.C. 4401, 4411 and 4412. These were applications, returns and required documents in connection with the gambling stamp statutes and wagering taxes. Further documents filed under compulsion of the State of Indiana were offered.

On January 29, 1968, the United States Supreme Court rendered its decisions in *Marchetti* v. *United States,* 390 U.S. 39, 19 L. Ed. 2d 889, 88 S. Ct. 697; *Grosso* v. *United States,* 390 U.S. 62, 19 L. Ed. 2d 906, 88 S. Ct. 709, and *Haynes* v. *United States,* 390 U.S. 85, 19 L. Ed. 2d 923, 88 S. Ct. 722, specifically overruling *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, and applying the privilege against self-incrimination to registration provisions in regard to gambling and firearms (R. p. 12).

On January 5, 1970, the United States District Court for the Northern District of Indiana denied the motion of the Respondent to vacate sentence and judgment and held against retroactive application of *Marchetti* and *Grosso* relying on *Mackey* v. *United States,* 411 F.2d 504, Certiorari granted, 38 L. W. 3210 (R. pp. 15-16), but the Court of Appeals reversed (Pet. App. C), and the Government filed a petition seeking a Writ of Certiorari.

This Court, on April 5, 1971. granted the government's Petition for Writ of Certiorari and remanded this case to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *Mackey* v. *United States*, 401 U.S. 667.

The Court of Appeals directed the parties to file supplementary briefs on this point, and on September 8, 1971, entered its second opinion (Appendix A) reversing its original opinion and affirming the District Court's denial of Zizzo's Petition.

REASONS FOR GRANTING THE WRIT

1. The real issue in this case, the issue which this Court did not decide when this case was previously before it, is whether in a case where gambling tax returns, which were filed under the compulsion of statutes which have since been held unconstitutional by this Court, have been used to prove over objection all of the elements of an alleged crime in violation of a statute which is part of the comprehensive federal scheme of laws directed against gambling, the cases of *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, should be given retroactive effect to set aside this petitioner's conviction of violating 18 U.S.C. 1952.

It is suggested that this case falls somewhere between this Court's decisions in *United States* v. *United States Coin and Currency,* 401 U.S. ....., 28 L.Ed. 2d 434 (where *Marchetti* and *Grosso* were given retroactive effect) and *Mackey* v. *United States,* 401 U.S. ....., 28 L.Ed. 2d 404 (where *Marchetti* and *Grosso* were denied retroactive effect).

Interestingly, the concurring opinion in the *Mackey* case points out a fundamental difference between the *Mackey* case and this case. That is to say, that the Fifth Amendment does not bar the use of information that, in furtherance of the general scheme of collecting taxes and enforcing the tax laws, required those in the business of accepting wagers to report their income, but rather the amendment bars forced disclosure of information that would have subjected the individual concerned to the real and appre-

ciable hazard of self-incrimination for violating State or federal laws proscribing gambling.

The statute which Zizzo was convicted of violating—18 U.S.C. 1952—"is a part of the Attorney General's crime program to combat organized crime and racketeering". 1961 U. S. Code Cong. and Adm. News 2665.

In Attorney General Robert Kennedy's letter to the Congress in support of passage of the statute, he stated:

> "The bill which I submit to the Congress would impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities'." (1961 U.S. Code Cong. and Adm. News 2666)

The Attorney General then went on to list those business enterprises which would be considered under the statute as unlawful activities, and the *first* activity mentioned was gambling.

It is further pointed out that the government consistently uses 18 U.S.C. 1952 to prosecute gamblers. (See the notes following 18 U.S.C. 1952 in United States Code Annotated.)

It is thus concluded that 18 U.S.C. 1952 (again—the statute which Zizzo was convicted of violating) is a part of the "comprehensive system of federal and state prohibitions against wagering activities". (See *Zizzo* v. *United States*, 431 F.2d at 916)

Mr. Justice Harlan's concurring opinion in *Mackey* is particularly important in this regard. While Justice Harlan agrees that retroactivity of *Marchetti* and *Grosso* should not be extended to the evidentiary use of wagering tax returns to show a possible source of income in a net-worth income tax evasion case, it is clear that such use should be prohibited in connection with a prosecution involving

one of the statutes directed against gambling. In fact, it is interesting to note that Justice Harlan lists 18 U.S.C. 1952 as one of the statutes particularly directed against gambling (28 L.Ed. 2d 428, note 3).

The Court of Appeals' opinion on Zizzo's direct appeal of his conviction also holds that the statute is part of the statutes directed against gambling (*United States* v. *Zizzo*, 7 Cir., 338 F.2d 577, 579, 580).

In this connection, it then becomes important to examine this Court's opinion in *United States* v. *United States Coin and Currency*, 401 U.S. ....., 28 L.Ed 2d 434, decided the same day as *Mackey*.

In that case, Justice Harlan writing for the majority affirmed the Seventh Circuit's judgment which held *Marchetti* and *Grosso* retroactively applicable to a forfeiture proceedings which was instituted in connection with a prosecution for failure to register as a gambler and pay gambling excess taxes (393 F.2d 499).

In that case, one Donald Angelini was convicted for failure to register as a gambler and to pay related taxes. Forfeiture proceedings were instituted against certain moneys in his possession when arrested. Justice Harlan, in writing for the majority, wrote:

> " . . . Marchetti and Grosso dealt with the kind of conduct that cannot constitutionally be punished in the first instance. These cases held that gamblers in Angelini's position had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them. In the absence of a waiver of that right, such persons could not properly be prosecuted at all.
>
> "Given the aim of the Marchetti-Grosso rule, it seems clear that the Government must be required to

> undergo the relatively insignificant inconvenience involved in defending any lawsuits that may be anticipated. Indeed, this conclusion follows a fortiori from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the fact finding process at trial. In those cases, retroactivity was held required because the failure to employ such rules at trial meant there was a significant chance that innocent men had been wrongfully punished in the past. In the case before us, however, even the use of impeccable fact finding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity." (*United States* v. *United States Coin & Currency,* 401 U.S. ....., 28 L.Ed. 2d 434, 440-441)

Clearly, the difference between the holdings is that *Marchetti* and *Grosso* must be given retroactive effect in cases which involve punishment as part of the comprehensive system of federal and state prohibitions against wagering activities.

Even the Solicitor General apparently concedes this, because in his brief filed in this Court in the *Mackey* case, he writes:

> "Although the Court did not decide the question in *Marchetti* and *Grosso,* the introduction of wagering tax forms against a gambler in a prosecution for violatio of a statute that is part of the 'comprehensive system of federal and state prohibitions against wagering activities' (*Marchetti* v. *United States,* supra, 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis,* 398 F.2d 64 (C.A. 7). This would seem to follow because such a statute is one of those

> that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that comprehensive statutory system." (Brief, p. 24).

(See *Zizzo* v. *United States,* 431 F.2d 913, at 916.)

In the recent decision of the United States Court of Appeals for the Fifth Circuit in *Lucia* v. *United States,* ..... F.2d ....., 28 AFTR 2d 71-5129, the Court held that the United States would be enjoined from using gambling tax returns of the same type as involved here, to base an assessment and levy of taxes.

2. It is suggested that a gross injustice would occur if this Court would allow a conviction to stand which is based almost solely on unconstitutionally obtained evidence.

In deciding that the *Marchetti* and *Grosso* cases should not be applied retroactively in the *Mackey* case, Mr. Justice White wrote for the majority at 28 L.Ed. 2d 410:

> "The short of the matter is that *Marchetti* and *Grosso* raise not the slightest doubt about the accuracy of the verdict of guilt returned here."

Yet, as the Court of Appeals pointed out in this case in its first opinion in answering the government's contention that the wagering tax returns were unnecessary to prove the elements of the offense:

> "We find this contention—apparently a variation of the clearly inapplicable harmless error doctrine—based more on speculation than reality." (431 F.2d at 917)

CONCLUSION

It is respectfully urged that because of the substantial Constitutional importance of the issue raised herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18168

FRANK ZIZZO, *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

SEPTEMBER 8, 1971

Before SWYGERT, *Chief Circuit Judge,* MURRAH, *Senior Circuit Judge*[1] and CAMPBELL, *Senior District Judge.*[2]

CAMPBELL, *Senior Judge.* This cause is again before this court on order of the Supreme Court vacating our judg-

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

[2] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

ment previously entered and remanding the case for reconsideration in light of the Supreme Court's views expressed in *Mackey* v. *United States,* 401 U.S. 667, on April 5, 1971. Counsel have filed new briefs with us explaining their differing interpretations of those differing views.

Frank Zizzo was convicted in 1963 of traveling in interstate commerce with intent to carry on a business enterprise involving gambling illegal under the laws of Indiana. 18 U.S.C. § 1952. In the course of his original trial and over his objection federal wagering tax forms signed and filed by him as required by law (26 U.S.C. §§ 4401, 4411 and 4412) were introduced into evidence. That conviction was affirmed by this court. *United States* v. *Zizzo,* 338 F.2d 577 (7th Cir. 1964). Zizzo subsequently filed a motion, pursuant to 28 U.S.C. § 2255 and other post conviction relief provisions, seeking to vacate the prior imposed sentence and judgment of conviction. In that post conviction petition, Zizzo relied on the opinions of the Supreme Court in *Marchetti* v. *United States,* 390 U.S. 39 (1968); and *Grosso* v. *United States,* 390 U.S. 62 (1968), which held that the Fifth Amendment privilege against compulsory self-incrimination was a valid defense to a prosecution for failure to register as a gambler and to pay the related occupational and gambling excise taxes under 26 U.S.C. §§ 4401, 4411 and 4412. Essentially Zizzo argued that under the reasoning of the Supreme Court's decisions in *Marchetti* and *Grosso* the introduction into evidence of his gambling tax returns violated his Fifth Amendment privilege against self-incrimination. He also argued that those decisions should be applied retroactively thus requiring that his original conviction be vacated.

We agreed with these contentions and vacated the judgment of conviction. *Zizzo* v. *United States,* 431 F.2d 913

(7th Cir. 1970). In reaching our conclusion that the *Marchetti* and *Grosso* decisions should be applied retroactively to Zizzo's case, we noted that the Supreme Court had not yet ruled on the question, and that the issue was then before the Court in certain cases awaiting argument, particularly *United States* v. *United States Coin and Currency* and *Mackey* v. *United States*. Those cases were both decided on April 5, 1971. This cause, then pending on the government's petition for *certiorari*, was remanded for reconsideration in light of *Mackey*.

Upon remand we have so reconsidered our decision and determine, contrary to our prior opinion, that the *Marchetti* and *Grosso* decisions should not be applied retroactively to void Zizzo's original conviction.

The *Mackey* case also originated in this Circuit pursuant to a motion to vacate a judgment of conviction. See 411 F.2d 504. Mackey was convicted of income tax evasion. His prosecution proceeded upon a net worth theory, under which the government was required to prove a likely source giving rise to the unreported income. The probable source of Mackey's unreported income was gambling. To prove this source the government offered into evidence numerous wagering tax returns filed by Mackey during the years in question.

Mackey's theory, similar to Zizzo's, was that the Fifth Amendment barred the prosecution's use of the wagering tax forms. This theory was rejected by both the district court and this court. The Supreme Court affirmed, holding that *Marchetti* and *Grosso* should not be applied retroactively to vacate the conviction in that case. The prevailing opinion was written by Mr. Justice White who was joined by the Chief Justice and Justices Stewart and Blackmun.

That opinion clearly calls for a similar denial of post-conviction relief in this case. The following observations from that opinion are particularly applicable.

> "There is no indication in *Marchetti* or *Grosso* that one of the considerations which moved the Court to hold that the Congress could not constitutionally compel citizens to register as gamblers and file related tax returns was the probable unreliability of such statements once given. Petitioner has not advanced any objective considerations suggesting such unreliability. The wagering tax returns introduced in evidence at his trial have none of the characteristics, and hence none of the potential unreliability, of coerced confessions produced by 'overt and obvious coercion.' *Johnson*, 384 U. S., at 730. Nor does Mackey suggest that his returns—made under oath—were inaccurate in any respect. Thus, a gambling excise tax return, like physical evidence seized in violation of a new interpretation of the Fourth Amendment, is concededly relevant and probative even though obtained by the Government through means since defined by this Court as constitutionally objectionable. As in *Desist, Elkanich,* and *Williams,* the result here should be that a pre-*Marchetti* trial in which the Government employed such evidence is not set aside through retroactive application of the new constitutional principle." (401 U.S. at 674-75).

Even more persuasive is Mr. Justice White's dissenting opinion in *United States* v. *United States Coin and Currency,* 401 U.S. 715, again joined in by the Chief Justice and Justices Stewart and Blackmun. In proposing a hypothetical tailor-made to our case, Justice White states:

> "Had Angelini registered and paid the federal tax and then been tried prior to *Marchetti-Grosso* for violating federal interstate gambling laws or state laws making gambling a crime, the admissions contained in his

registration and gambling tax returns would have been relevant and presumptively reliable evidence of guilt, properly admissible under *Kahriger* and *Lewis*. And if after *Marchetti-Grosso*, Angelini had complained about the use of this evidence, *Tehan* v. *Shott*, 382 U.S. 406 (1966), and *Johnson* v. *New Jersey*, 384 U.S. 719, 732 (1966), would surely dictate denial of relief whether Angelini came here on direct review of his conviction or from denial of collateral relief." (401 U.S. at 733).

On the other hand, Justices Black and Douglas who dissented in *Mackey* would clearly affirm our decision giving *Marchetti* and *Grosso* broader retroactive sweep. Justices Brennan and Marshall voted with the majority in *Mackey*, but would apparently distinguish the *Zizzo* case from *Mackey* on the same basis as we did in our original opinion, that is that *Zizzo*, unlike *Mackey*, was convicted of a gambling related offense and the purpose of *Marchetti-Grosso* was, "to protect the individual against self-incrimination under the comprehensive system of federal and state prohibitions against wagering activities." 431 F. 2d at 916. In the opinion written by Mr. Justice Brennan, in which Justice Marshall concurred, there is reference to the fact that the *Mackey* case, "does not involve a prosecution for gambling or related activities." The opinion then observes:

"If such a reporting requirement raises a substantial danger of incrimination under state or federal statutes making criminal the activity that is being taxed, an individual may, of course, assert the privilege against self-incrimination and refuse to disclose the information sought. We so held in *Marchetti* and *Grosso*. And if the information has been compelled over a claim of privilege, application of those cases requires that the individual be protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity and to complete immunity from prosecution under federal statutes of like kind." (401 U.S. at 710).

With the Court thus potentially divided at 4-4, the swing vote appears to be that of Mr. Justice Harlan, who wrote the majority opinion in *United States Coin and Currency* and an extensive concurring opinion in *Mackey*. Justice Harlan it seems would first distinguish between the cases coming before the Court on direct review and those on collateral review. In those cases coming on collateral review, *i.e.* habeas corpus, Justice Harlan states that it is sounder, "generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all of these cases on the basis of intervening changes in constitutional interpretation." 401 U.S. at 689. In other words, if a conviction was valid at the time it became final, Justice Harlan would not disturb that conviction upon collateral review based on changes in constitutional law, except that, "New 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe," would be given retroactive effect. He would also grant retroactive application to those claims of nonobservance of basic procedures that are, "implicit in the concept of ordered liberty." Id. at 692-3.

Applying these principles, Justice Harlan voted for retroactive application of *Marchetti-Grosso* in *United States Coin and Currency,* because that case involved the crime of failure to register under the statute—conduct which the Court had concluded was beyond the power of Congress to punish. In distinguishing *Mackey,* Justice Harlan writes:

> "In this regard, Mackey's claim differs from that raised by the respondent in *Coin and Currency*, also decided today, where *Marchetti* and *Grosso* do operate to render Congress powerless to punish the conduct

> there at issue. Instead, *Mackey's* claim is that the procedures utilized in procuring his conviction were vitiated by the *Marchetti* and *Grosso* decisions. Since matters of procedure rather than substance are involved, * * * I would apply to the resolution of this habeas petition the law in effect at the time *Mackey's* conviction became final, absent a showing that the procedures employed were fundamentally unfair." (401 U.S. at 700-1)

It seems to us if this case were decided when it was before the Supreme Court Justice Harlan would have concluded that like *Mackey* it involves only procedures utilized in procuring a conviction and he would therefore have voted to apply to the resolution of this habeas petition the law in effect at the time the conviction became final. Under that law the admission into evidence of the wagering returns would not be error.

Accordingly, the decision of the district court denying the motion to vacate the judgment of conviction is at long last affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, September 28, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ALFRED P. MURRAH, *Sr. Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Sr. District Judge*

FRANK ZIZZO,

Petitioner-Appellant,

No. 18168 vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX C

(Reported at 431 F. 2d 913)

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18168

FRANK ZIZZO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

SEPTEMBER 9, 1970

Before SWYGERT, *Chief Circuit Judge,* MURRAH, *Senior Circuit Judge*[1] and CAMPBELL, *Senior District Judge.*[2]

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

[2] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

CAMPBELL, *District Judge.* This cause comes before this court on petitioner's appeal from an order of the district court denying his motion presented pursuant to 28 U.S.C. §2255 and other post conviction relief provisions[3] seeking to vacate a prior imposed sentence and judgment of conviction.

Petitioner ("Zizzo") and three co-defendants were convicted of traveling in interstate commerce with the intent to promote, manage or carry on etc., an unlawful activity, to wit, a gambling business illegal under the laws of the State of Indiana. 18 U.S.C. §1952 and 18 U.S.C. § 2. The evidence in the case established that Zizzo operated a gambling business at various addresses in the State of Indiana. The government's proof against Zizzo also established that he employed three persons (co-defendants) in his gambling business who were residents of Illinois. The government's successful theory in convicting Zizzo was that his gambling operations in Indiana were the inducement for the interstate travel of his employees who were living in Illinois, and that he thus aided and abetted these three co-defendants in their travel and in their engaging in illicit gambling operations in Indiana.

In the course of his trial and over his objection federal wagerng tax forms signed and filed by him as required by federal law (26 U.S.C. §§4401, 4411 and 4412) were introduced into evidence. His conviction was affirmed by this court. *United States* v. *Zizzo*, 338 F.2d 577 (1964). In affirming, this court rejected the contention that the use of the wagering tax forms and returns as evidence in his case violated Zizzo's privilege against self incrimi-

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[3] In the alternative of relief under §2255, petitioner sought relief in the nature of error coram nobis or for relief under rule 35, F.R.Cr.P. or under 28 U.S.C. §1651.

nation, citing *Lewis* v. *United States*, 348 U.S. 419 (1955); and *United States* v. *Kahriger*, 345 U.S. 22 (1953). These cases have since been overruled. *Marchetti* v. *United States*, 390 U.S. 39 (1968); and *Grosso* v. *United States*, 390 U.S. 62 (1968). In support of his motion to vacate his conviction, Zizzo contends that the rationale of the *Marchetti* and *Grosso* decisions should be applied retroactively and requires, under the facts of this case, that his conviction be vacated. In opposing petitioner's motion the government argues first that *Marchetti* and *Grosso* should not be given retroactive effect, and in the alternative, that their retroactive effect should not be applied to the facts of this case.

As to the retroactive effect of the *Marchetti* and *Grosso* decisions, we first note that the Supreme Court has not yet ruled on this question although the issue is presently before the Court in a number of cases which are awaiting argument. See *United States* v. *United States Coin and Currency*, Oct. Term, 1970 docket No. 5 and *Mackey* v. *United States*, Oct. Term, 1970 docket No. 36. Without attempting to predict how the Supreme Court may decide the issue, we find that this court has taken a firm position in favor of retroactive application in a very similar case. In *United States* v. *Michael*, 426 F.2d 1067 (1970), we held that the Supreme Court's decision in *Haynes* v. *United States*, 390 U.S. 85 (1968) is to be applied retroactively. See also, *United States* v. *Miller*, 406 F.2d 1100 (4th Cir. 1969). *Haynes* was decided the same day as *Marchetti* and *Grosso* and, adopting similar rationale, held that prosecution under statutes which require certain fire arms to be registered, (26 U.S.C. §§5841 and 5851) violated the defendant's Fifth Amendment privilege against self-incrimination. We believe the same rationale applies to the wagering form and registration statutes

which were the subject of the *Marchetti* and *Grosso* decisions, and accordingly we concluded that those decisions are likewise to be applied retroactively.

In support of its contention that retroactive application of *Marchetti* and *Grosso* should not affect the outcome of this case, the government relies on the decision of this court in *Mackey* v. *United States,* 411 F.2d 504 (1969), cert. granted 396 U.S. 954 (1969), Oct. Term, 1970 Docket No. 36. The *Mackey* case also came before this court on an appeal from the district court's denial of a motion to vacate a sentence pursuant to §2255. Mackey was convicted of income tax evasion. His prosecution proceeded upon a net worth theory, under which the government was required to prove a likely source giving rise to the unreported income. *Holland* v. *United States,* 348 U.S. 121, 138 (1954). The probable source of Mackey's unreported income was gambling. To prove this source the government offered into evidence numerous wagering tax returns filed by Mackey during the years in question.

In affirming the district court's denial of Mackey's motion to vacate his conviction on the basis of the *Marchetti* and *Grosso* decisions, this court held that while *Marchetti* and *Grosso* may be applied retroactively to defendants who have been prosecuted for failure to file wagering tax returns, it need not be applied retroactively to Mackey's case, because he was not charged with failure to file returns or with a gambling offense.

> "Here the defendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes. The purpose of the rule of *Marchetti* and *Grosso* has no application to warrant retroactivity here. Its object was to protect the individual against self-incrimination under

> the 'comprehensive system of federal and state prohibitions against wagering activities * * *.' *Marchetti* v. *United States*, 390 U.S. 39, 48, 88 S.Ct. 697, 703 (1968)" (411 F.2d at 509).

The court then concluded that in Mackey's case, "the returns were no more incriminating than a report of any lawful business activity as a likely source of unreported income." 411 F.2d at 509. The court further concluded that under those circumstances the purpose of *Marchetti* and *Grosso* — "to protect the individual against self incrimination under the comprehensive system of federal and state prohibitions against wagering activities" — is "extraneous to the conviction and does not call for retrospective application." Id.

We find the facts of this case quite distinct from those before the court in *Mackey*. Zizzo was convicted of a gambling related offense. In short, he was convicted under the "comprehensive system of federal and state prohibitions against wagering activities".

In *United States* v. *Lookretis*, 385 F.2d 487 (7th Cir. 1967) the defendant was convicted of an identical offense. The defendant there raised the same argument that Zizzo raised in his initial appeal, *i.e.*, that the introduction of wagering tax forms violated his constitutional privilege against self incrimination. As in this case, this court originally rejected the argument on the basis of the *Lewis* and *Kahriger* decisions. The Supreme Court granted certiorari in that case, but before the Court heard arguments, *Marchetti* and *Grosso* were decided. The Supreme Court then vacated and remanded the case to this court for consideration in light of those cases. 390 U.S. 338 (1968). Upon reconsideration this court vacated the conviction and remanded the case for a new trial, stating: "As we understand the impact of *Marchetti*

on the instant case the stipulated disclosures compelled by defendant's compliance with the federal wagering tax statutes are inadmissible against him over his assertion of the constitutional privilege against self incrimination." *United States* v. *Lookretis*, 398 F.2d 64, 65 (1968).

Here, too, we believe that the disclosures compelled by petitioner's compliance with the wagering tax statutes are inadmissible over his assertion of his privilege against self incrimination and their admission in this case must void his conviction. Although the *Lookretis* case was not complicated by the retroactive question, we believe the result we reach here logically follows our conclusion above that *Marchetti* and *Grosso* are to be applied retroactively. We also note that our distinctions of *Mackey* and our reliance on *Lookretis* are similar in approach to the position taken by the Solicitor General in the brief for the United States filed before the Supreme Court in the *Mackey* case. In discussing the limits of the application of *Marchetti* and *Grosso*, the Solicitor General states:

> "Although the Court did not decide the question in *Marchetti* and *Grosso*, the introduction of wagering tax forms against a gambler in a prosecution for violation of a statute that is part of the 'comprehensive system of federal and state prohibitions against wagering activities' (*Marchetti* v. *United States*, *supra*, 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis*, 398 F.2d 64 (C.A. 7). This result would seem to follow because such a statute is one of those that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that comprehensive statutory system." (Brief, p. 24).

The government attempts to further distinguish *Lookretis* by arguing that the wagering tax returns were introduced only to prove Zizzo's knowledge that his employees resided in Illinois — a fact which may not be essential to the crime. See *United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967). In other words, the wagering tax returns were "unnecessary to prove the elements of the offense".

> ". . . [h]ad they not been admitted into evidence, the proof of the required elements of the offense would remain the same and the trier of fact could not have conceivably arrived at a different verdict."

We find this contention, — apparently a variation of the clearly inapplicable harmless error doctrine — based more on speculation than reality. See *United States* v. *Lookretis*, 398 F.2d 64, 65-6.

For the reasons stated herein the decision of the district court is reversed and the judgment order of conviction is ordered vacated and the cause is remanded to the district court for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.